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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee,

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

Real Parties in Interest.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss Appeal

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Real Parties in Interest.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss Appeal

The Public Utilities Commission of the State of California, appearing herein as appellee, moves this Court to dismiss for want of jurisdiction the appeal taken herein by appellant above-named upon the following grounds:

1. Appellant has no standing to assert in this Court the constitutional claims specified in the Jurisdictional Statement.

2. The appeal does not present a substantial federal question.

OPINIONS BELOW

The judgment of the Supreme Court of California denying a writ of review or mandamus was rendered without opinion. It is reported in 57 Advance California Reports, No. 10, Minutes, page 1.

The decisions of the Public Utilities Commission of California, Decisions Nos. 59455, 61261, and 62117, are reported in 57 California Public Utilitjes Reports 485, 58 California Public Utilities Reports 374, and 58 California Public Utilities Reports 746, respectively.

THE QUESTIONS PRESENTED

The only questions properly before this Court are whether the appellant has standing to maintain this appeal and whether the appeal presents a substantial federal question. All four alleged federal questions presented by appellant's Jurisdictional Statement (pp. 8-9) are unsubstantial. This will be demonstrated in our argument.

PRELIMINARY STATEMENT.

Appellant has seemingly taken a direct appeal to this Court from a decision of the Supreme Court of the State of California under the terms of 28 U.S.C., Section 1257(2). Appellant recognizes that *certiorari* is a possible method of review herein pursuant to 28 U.S.C., Section 1257(3) and has prayed this Court to consider its jurisdictional statement as an alternative petition for writ of *certiorari*.

In an attempt to conserve the time of this Court, appellee Commission has chosen to consider the document filed by appellant as a jurisdictional statement called for by Rule 15 of the Rules of this Court. The motion to dismiss will be accordingly directed thereto.

Should the Court, however, deem appellant's papers a petition for writ of *certiorari* a more detailed response than here made would become necessary. In such case appellee Commission respectfully requests that it be granted permission to file a more extensive answer than that which is contained herein.

STATEMENT OF THE CASE

On November 7, 1958 Southern California Gas Company and Southern Counties Gas Company of California (Gas Companies), real parties in interest herein, filed an application with the California Public Utilities Commission (appellee Commission) which sought a certificate of public convenience and necessity under Section 1001 of the California Public Utilities Code. The subject of the certificate applied for was construction and operation of a natural gas pipeline within the State of California from a point near the California-Nevada border to Newberry, California.

The proposed California pipeline was a section of an interstate pipeline originating near Rock Springs, Wyoming, and extending to California. This undertaking is commonly referred to as the Rock Springs project and would facilitate the sale of natural gas by El Paso Natural Gas Company to the Gas Companies.

Twenty-five days of public hearing were held upon this application from January 13, 1959 to July 27, 1960. Southern California Edison Company, appellant herein, entered

an appearance in the Commission proceedings as an interested party.

Appellant is a public utility electrical corporation which purchases gas used for generating electrical power on an interruptible service basis; i.e., appellant's service may be interrupted at times additional gas is needed to satisfy the needs of firm, or non-industrial, customers. Appellant participated actively in the hearings on the Rock Springs application, its position being that its attempts to procure an independent source of gas and the impact of its projected withdrawal from the Gas Companies market should it be successful in its attempts were matters for Commission consideration.

On December 5, 1960 appellant and California Gas Transmission Company filed applications with the appellee Commission for a certificate of public convenience and necessity, which would authorize construction of a natural gas pipeline from the California-Mexico border to certain of appellant's generating plants in California. This pipeline was part of an overall project that would transport gas from Texas, across the Texas-Mexico border, thence across Mexico into California. This pipeline is known as the Pemex project. Hearings on the Pemex applications were begun in January, 1961 and were concluded in May, 1962.

On December 28, 1960 the appellee Commission conditionally granted a certificate of public convenience and necessity to the Gas Companies which authorized the California segment of the Rock Springs project. (Decision No. 61261, Ptn.,[1] Appx., Exh. C.).

The Gas Companies subsequently filed with appellee Commission a "Statement of Compliance with Conditions and Request for Issuance of Supplemental Order Authorizing

1. Ptn.—"Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus."

Construction." Hearing was held on this matter and appellant again appeared and was heard.

Following this hearing, on June 6, 1961, the Commission issued its Decision No. 62117 (Ptn., Appx., Exh. A) wherein it was expressly found that the Gas Companies had complied with all of the conditions prescribed by the prior decision. The certificate of public convenience and necessity previously granted was made applicable to the Rock Springs pipeline construction.

Appellant petitioned the Commission for a rehearing of Decision No. 62117 (Ptn., Appx., Exh. E). This was denied (Ptn., Appx., Exh. F).

A petition for writ of review or, in the alternative, for a writ of mandamus was filed in the California Supreme Court (Ptn., Vol. I). The court denied the petition without opinion (Jur. St.[2] Appx. A). This appeal follows that decision.

Both the Rock Springs project and that of Pemex require a certificate of public convenience and necessity from the Federal Power Commission under the terms of Section 7(c) of the Natural Gas Act (15 U.S.C. § 717f(c))[3] Applications are presently before that Commission in this regard. (The Pemex project is covered by F.P.C. Docket No. CP 61-172 et al., and Rock Springs by F.P.C. Docket No. G-16235 et al.) The Federal Power Commission has not yet authorized either pipeline.

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2. Jur. St.—"Statement as to Jurisdiction."

3. 15 U.S.C. § 717f(c) "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the contruction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations; * * *"

The application of appellant for authorization of the California part of the Pemex plan has been submitted to the appellee Commission following extensive hearings and briefs therein. Decision of that matter by appellee is presently pending.

ARGUMENT

I. Appellant Has No Standing to Seek Redress in This Court.

Appellant's interest in the certificate proceeding before the Commission was that of "a customer of the natural gas companies that would operate the California portion of the 'Rock Springs' project." (Jur. St. p. 3). Its status as an applicant in the Pemex matter arose subsequent to its appearance in the Rock Springs application. The issue that presents itself at the threshold of this appeal is whether appellant, as a customer of the Gas Companies, has suffered substantial injury so as to complain to this Court of the procedure involved in granting a certificate of public convenience by the Commission to the Gas Companies for construction of an intrastate pipeline. In other words, may appellant urge to this Court that the grant of a license, authorizing construction of a natural gas pipeline by its supplier of gas, constitutes an invasion of *appellant's* constitutionally protected rights?

It is a rudiment of Constitutional law that proper standing to raise a federal question is a condition precedent to review by this Court. The Court recently had occasion to reaffirm this principal. In *Poe v. Ullman*, (1961) 367 US 497, 502-505, Mr. Justice Frankfurter wrote:

> "The restriction of our jurisdiction to cases and controversies within the meaning of Article 3 of the Constitution . . . is not the sole limitation on the exercise of our appellate powers, especially in cases raising

constitutional questions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (concurring opinion).

"These considerations press with special urgency in cases challenging legislative action or state judicial action, as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' *Parker v. County of Los Angeles*, 338 U.S. 327, 333.

"The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations . . . of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. [citations] . . . 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement' . . . [citation]."

Here appellant is a customer of the applicant Gas Companies. It has purchased and presently purchases natural gas from the latter on an interruptible service basis. Appellant would prefer to purchase gas from another source and is a party to pipeline certificate proceedings (Pemex) presently pending before the appellee Commission which would

enable it so to do. For purposes of this appeal, appellant has assumed that the issuance of a certificate in the Rock Springs proceeding *ipso facto* decided the fate of its Pemex application. There is no proof of this to be the fact. The Commission is in no way precluded from finding that the California public convenience and necessity require certification of the Pemex project in addition to Rock Springs. Additionally, if Pemex is denied, it is impossible to perceive wherein appellant suffers injury in that in such case it will remain in its present position as a customer of the real parties in interest herein. It has not been asserted that continuation of the *status quo* results in injury to appellant.

Appellant states that the Rock Springs project is directly tied in with the validity of a merger of the pipeline's suppliers of gas, El Paso Natural Gas Company and Pacific Northwest Pipe Line Co. (Jur. St. p. 48). Since the validity of this merger, upon which the project so depends, is presently being litigated in federal district court (*United States v. El Paso Natural Gas Co.*, Utah, C.D. No. 143-57), it is uncertain whether the Rock Springs project will ever become a reality. Any theoretical injury to appellant is remote under such circumstances.

Furthermore, the Rock Springs project is awaiting certification by the Federal Power Commission. Pemex also requires a certificate from that agency. Since the action of this Commission is not conclusive on the issue of construction of the Rock Springs pipeline, nor is it binding on the Federal Power Commission, for appellant to profess injury in this regard is at best anticipatory.

It is submitted that this appeal must yield to the Court's aforementioned doctrines of "ripeness" and "standing" which compel its dismissal.

II. The Appeal Does Not Present a Substantial Federal Question.

A. THERE WAS NO ERROR IN REGARD TO THE FINDINGS AS MADE BY THE COMMISSION.

1. The Commission's Findings Were Consistent With Due Process of Law.

Appellant argues that the California Supreme Court's denial of its petition for writ of review of the Commission's decision impliedly construed the California statutes, which authorize the Commission to grant certificates of public convenience and necessity, so as to dispense with the need for making findings on all issues litigated. Appellant maintains that such a construction is contrary to the requirements of due process of law guaranteed by the Fourteenth Amendment.

This is an erroneous view of the law. The Constitution does not demand that findings be made to the standard advocated by appellant. The sole requirement for the issuance of a certificate of public convenience and necessity is a finding on that issue predicated upon substantial evidence. Due process of law requires no more.

There is no set formula or series of issues which make up public convenience and necessity. *Interstate Commerce Comm. v. Parker* (1945), 326 U.S. 60, 65. *San Diego etc. Ferry Co. v. Railroad Comm.* (1930), 210 Cal. 504, 511. See also Davis, *Administrative Law Treatise*, Sec. 16.11, page 471.)

At the time of the decisions of the Commission here in question, Section 1705 of the California Public Utilities Code provided that "After the conclusion of the hearing, the Commission shall make and file its order, containing its decision." This section was amended during the 1961 sessions of the California Legislature to require that findings be separately stated and presently reads as set forth by appellant (Jur. St., Appx. 3, p. 10).

In a case arising from a comparable provision of the Interstate Commerce Act,[4] this Court has said:

> "As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14(1) of the Interstate Commerce Act, 49 U.S.C. § 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. [citation]. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment, is sufficiently disclosed in its report. Of course § 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. [citations].[5] And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. [citations]. Here the Commission found, in conformity to the statute invoked, . . . that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest' and 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data. . . .' [citation]. Enough has been 'put of record to enable us to perform the limited task which is ours.' [citation]." *Alabama Great S.R. Co. v. United States* (1950) 340 U.S. 216, 227-228

This language applies equally well to the present case. The Commission acted in conformity with Sections 1001 and

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4. 49 U.S.C. § 14(1) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made.

5. "Quasi-jurisdictional" findings are those essential to the existence of authority to enter the order. *Lubetich v. United States* (1942) 315 U.S. 57.

1005 of the California Public Utilities Code as in its judgment the public convenience and necessity required the Rock Springs project. Since Section 1705 did not require the Commission to make subsidiary findings to support the ultimate finding of public convenience and necessity, the Commission pursued a similar course to that of the Interstate Commerce Commission which was endorsed by this Court in the cited case.

The rule of administrative finality also governs this appeal. The rule is that if the Commission's order is based upon adequate findings which, in turn, are supported by substantial evidence, it cannot be disturbed by a court on review, even though the court might consider the Commission's action wrong, and against the weight of the evidence (*Interstate Commerce Comm'n v. Union Pac. R. Co.*, (1912) 222 U.S. 541). Appellant makes no contention that the evidence failed to support the grant of the certificate. Instead its quarrel is with the decisional form employed in issuing such authority.

A case which presented an issue similar to that raised by appellant rejected the argument here advanced. Where the sufficiency of findings to support a reparation order of the Interstate Commerce Commission was in question, it was held:

> "The finding was in the nature of a factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission. We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to sub-

stitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. The field for exertion of the judicial function is exhausted when it appears that there was a rational basis for the intelligent finding or conclusion of the Commission. *Virginia Ry. Co. v. United States* (1926) 272 U.S. 658; *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U.S. 282." (*Johnston Seed Co. v. United States* (10th Cir. 1954) 191 Fed. 2d 228, 231)

The record of the proceedings before the appellee Commission contained ample evidence to support the finding that public convenience and necessity would best be served by certification of the Rock Springs project. Due process of law has been satisfied.

2. Ultimate Findings by This Commission Are Legally Sufficient Under California Law.

Appellant has cited several cases of this Court which it is urged enunciate a universal rule that an "ultimate" finding of fact by an administrative tribunal must be supported by essential underlying findings of fact. Appellant's reliance on these cases is misplaced.

In *Southern Pacific Co. v. Railroad Comm.* (1939), 13 Cal. 2d 89, it was argued that a finding by this Commission to the effect that petitioners' proposed rate was "unreasonably low and not justified by transportation conditions" constituted a mere conclusion of law; accordingly, it was urged that this finding must be based upon specified facts. In support of this proposition, petitioners, as do appellants here, cited *Wichita R. & Light Co. v. Public Util. Comm.* (1922), 260 U.S. 48; and *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388. The California Supreme Court stated, at page 109 of 13 Cal. 2d:

"However, it is to be observed that none of those cases [referring to the *Wichita* and *Panama Refining* cases, *inter alia*] presented a situation where the requirements of the particular act under review were expressed in language similar to Section 67 [now codified as Sec. 1757, Pub. Util. Code[6]]; and that although the decisions to which petitioner has referred might be most persuasive were the language of Section 67 not so authoritative and inclusive, it is apparent that in the light of the legislative pronouncements set forth in that section, the several rulings indicated in the cited cases are not controlling."

Appellants also refer to *Mahler v. Eby* (1924) 264 U.S. 32. That case too has no relevance here. Its holding that a federal agency must make findings in support of its orders was based on the Constitutional framework of the federal government in order to prevent an unconstitutional delegation of Congressional legislative power to administrative agencies. The instant case involves the framework of state government, with no similar inhibition (Cal. Const., Art. XII, secs. 22 and 23 (Jur. St. Appx. B, pp. 3-6)).

Similarly, appellant's utilization of the arguments advanced in *California v. Federal Power Commission* (1962) 368 U.S. 810, are not in point. In its brief in that case California attacked a decision of the federal agency on several

6. §1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the Commission as certified to by it. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination.

grounds, one of which was that basic findings had been omitted. (The case was decided on another point.) The argument made by California in respect to findings was that the lack thereof in the decision of the Federal Power Commission was contrary to the rule laid down by this Court in *Colorado-Wyoming Gas Co. v. Federal Power Comm.* (1945) 324 U.S. 626. It was there held that the federal administrative rule calling for specific findings applied to proceedings before the Federal Power Commission. California's argument was directed towards the failure of the federal agency to provide the findings as prescribed by this Court. Such contention is inapplicable here. The law in California does not demand specificity of findings to the degree required under the federal statutes. (See *Southern Calif. Freight Lines v. Public Util. Comm.* (1950) 35 Cal. 2d 586; *Southern Pacific Co. v. Railroad Comm.* (1939) 13 Cal. 2d 89.)

Under California law, full legislative powers, which are cognate and germane to public utility regulation, have been constitutionally delegated to the appellee Commission. It follows that legislative proceedings which involve public convenience and necessity are not governed by the strict procedural restrictions imposed by Congress upon federal agencies in order to avert unconstitutional delegation of its legislative powers.

3. Underlying Findings Are Contained in the Decisions Involved.

In its Decision No. 61261 (Pltfs. Appx. Exh. C) the appellee Commission discussed all aspects of the Rock Springs project at length. In addition to its narrative treatment of the evidence adduced before it, the Commission made specific findings on the advantages and disadvantages of the Gas Companies' proposal. The Commission there held,

". . . the disadvantages outweight the advantages, *unless* applicants can obtain contract revisions or new contracts to eliminate the need for a rate increase, to reduce the period before the project is economically feasible and to maintain a reasonable balance in the two-tiered economy." (Ptn., Appx. Exh. C, p. 6) (Emphasis added.) The Commission further declared in this decision, "In view of the fact that the president of El Paso has expressed willingness to modify the contracts, that the applicants and the City of Los Angeles have recognized that the Commission may properly take this fact into consideration, the Commission finds and concludes that public convenience and necessity require the construction, maintenance and operation of a 24-inch pipeline and related facilities between the California-Nevada border near Ivanpah Valley and Newberry, California subject to the condition that applicants be offered by El Paso Natural Gas Company, revised or new supply contracts (preferably new contracts) that will be more attractive to the California ratepayer than present contracts and acceptable to the applicants and to the Commission, and such revised or new contracts to conform to the requirements of the order herein."

The conditions in the order were restated in Decision No. 62117. (Ptn., Appx., Exh. A, p. 2) which followed hearings on the Gas Companies' "Statement of Compliance with Conditions and Request for Issuance of Supplemental Order Authorizing Construction". This decision also contains an extensive discussion of the economic feasibility of the Rock Springs plan and relates the showing made by the Gas Companies in this regard pertaining specifically to the potential impact of their loss of the Edison load (Ptn., Appx., Exh. A, pp. 7-61). Since Decision No. 62117 found that the applicants had complied with the conditions

of the Order in Decision No. 61261, the construction of the intrastate segment of the pipeline was accordingly authorized.

The practice of predicating the ultimate finding upon a reading of all of the three decisions involved below has been approved by this Court. In *Meeker v. Lehigh Valley R. Co.* (1914) 236 U.S. 412, 427-428, it was said:

> "Another objection which was directed against the orders as well as the reports is that they contain no findings of fact, or, at least, not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined. We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts. . . . Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirement of the statute, and that the facts stated in the findings if taken as prima facie true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say 'should be' because both were made in the same proceeding, and the later one affirmatively shows that it was made to supplement and give effect to the original."

The case at bar falls foursquare within the compass of this language. It should be controlled thereby.

B. CONSOLIDATION OF THE ROCK SPRINGS HEARINGS WITH THOSE OF THE PEMEX PROJECT WAS NOT REQUIRED.

Appellant presupposes denial of its application for the Pemex project by this Commission. This assumption is premised on the argument that the Rock Springs pipeline and that of Pemex are mutually exclusive and that the authorization of the former dispels any need for the latter. It therefore argues that due process of law requires that applications before administrative agencies involving mutually exclusive proposals be consolidated for hearing and jointly decided. Appellant contends that denial of its petition for writ of review by the California Supreme Court appears to sanction an administrative procedure of pre-judgment of pending applications. In support of appellant's position it cites *Ashbacker Radio Corp. v. Federal Communications Comm.* (1946) 326 U.S. 327. This argument has several defects.

1. There Is No Showing That the Pemex Project Has Been Prejudged by This Commission.

Appellant concedes that the evidence received in both of the supposedly mutually exclusive applications might support a conclusion that "the Southern California market may be able to utilize supplies from both the Rock Springs and the Pemex project." (Opr. St., p. 37) If such a showing was manifest even to appellant, it cannot fairly be said that the authorization of one project automatically nullified and prejudged the merits of the second application. This is especially so in view of the fact that both Rock Springs and Pemex must obtain additional authorization from the Federal Power Commission.

There has been no showing whatsoever that the decisions of the appellee Commission inevitably lead to the conclu-

sion which appellant here sponsors. In absence of such demonstration appellant is unable to supply this Court with any rational basis for its argument that the Commission has prejudged its application.

Where an order of an administrative body, exercised with a proper grant of power from the legislature, is assailed, there exists a presumption of validity (*Federal Power Comm. v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602). One who would seek to have such an order annulled bears a heavy burden of proof, and must specifically set forth facts relied upon to rebut the aforesaid presumption of constitutionality (*Pacific States Box & Basket Co. v. White* (1935), 296 U.S. 176).

Appellant has not met this burden.

2. The "Ashbacker Doctrine" Does Not Apply to Hearings Conducted by Appellee Commission Under the California Public Utilities Code.

Ashbacker Radio Corporation v. Federal Communications Comm. (1946), 326 U.S. 327, relied upon by appellant, concerned two applications before the FCC for authorization to operate radio transmitters of identical frequency and power output in close proximity to one another. The two stations would have effectively "jammed" each other's transmission. The federal agency, after declaring the applications "actually exclusive" granted one applicant a certificate and set the other application for hearing. This Court reversed the FCC's action and ordered the cases to be consolidated.

It was said in *Ashbacker*, at page 333:

> ". . . We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

That opportunity was written into the FCC's governing statutes which provided that that agency could grant broadcasting licenses without hearing, but could not deny licenses without hearing. In California a different statutory scheme prevails. There is no clear rule enunciated which guarantees a hearing to applicants, or to competitors who do not own *existing* systems which may be "interfered with" by the grant of a certificate. Apparently, applications for certificates of public convenience and necessity may be either granted or denied with or without hearing.[7] The only parties who would be clearly entitled to a hearing under the statute would be utilities which own systems which have been already constructed.[8]

Since the rationale of the *Ashbacker* case is based upon the Congressional mandate to the Federal Communications Commission to afford an applicant a hearing before denial of his application, the rule of that case would not seem to apply under California law to applications to appellee Commission for certificates of public convenience and necessity.

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7. § 1003. The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it . . . provided, however, upon timely application for a hearing *by any person entitled to be heard thereat*, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereupon. (Emphasis added.)

8. § 1001. . . . If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility, *already constructed*, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable. (Emphasis added.)

3. The "Ashbacker Doctrine" Does Not Apply to the Facts of This Case.

The situation which occasioned this appeal is substantially different from that presented in *Ashbacker*. The mutual exclusiveness of applications for authorization to broadcast within a similar area of reception on the identical frequency logically compelled the granting of one and the denial of the other. The present facts do not dictate a like result.

A comparison of the application in the Rock Springs matter with that in Pemex does not indicate that they are actually exclusive. The markets sought by the respective applicants are not identical.

The application of the real parties in interest herein concerning Rock Springs (Application No. 40588) reveals that authority was sought to serve all their retail and wholesale customers in Southern California. The application states:

> *"Conclusion*
>
> "From the foregoing, it is apparent that the combination of the declining California source natural gas supplies and the increased demands for service by *all customers* make it necessary for Applicants to obtain additional out-of-state gas in the near future for *the California gas customers served by Applicants at retail and at wholesale.* (Emphasis added.)

On the other hand, the applications in Pemex indicate that the primary purpose of the construction authorization sought therein was to supply gas to only one customer, appellant. Application No. 42531 states:

> "Applicant seeks herein authorization to construct . . . a . . . natural gas pipeline . . . This new natural gas pipeline system will initially transport natural gas *purchased by Edison* in the State of Texas and in the Republic of Mexico to the following steam electric generating plants owned and operated by *Edison*:" (naming five; emphasis added.)

There was evidence before appellee Commission that the Edison load constituted only 10 per cent of the total market requirements of the real parties in interest herein. Also appellant has admitted that certification of *both* the Rock Springs project and the Pemex project may be warranted (Jur. St. p. 37).

There is a further factual difference here from that in *Ashbacker*. Both applicants have been accorded extensive hearings by appellee Commission. While a certificate was granted to the real parties in interest after such hearing, the application of appellants has not yet been decided.

In view of the foregoing the "Ashbacker Doctrine" is inapposite to this case.

C. THE CALIFORNIA STATUTORY SCHEME FOR JUDICIAL REVIEW OF DECISIONS OF THE PUBLIC UTILITIES COMMISSION IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE.

Appellant asks this Court to strike down three sections of the California Public Utilities Code dealing with the issuance of certificates of public convenience and necessity (Sections 1001 and 1005) and with judicial review of the Commission's actions (Sections 1757 and 1760). Its contention is that the instant case *appears* to construe these statutes as authorizing illegal action by the Commission without review thereof by the California Supreme Court. Foregoing sections of this argument have shown that there was no impropriety in the Commission's decision making procedure. Similarly, review by the California Supreme Court was properly accorded appellant. Its dispute with the review procedure would appear to be derived from the denial of its petition for writ of review without discussion by the Court. Because of this it infers that an independent judgment of the Commission's decisions was not provided. This is not the law.

This Court has held that where a petition for review of a decision of appellee Commission is denied this is tantamount to a decision of the Court that the orders of the Commission did not exceed its authority or violate any right of the petitioner under the Constitution of the United States or of the State of California. ". . . Absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented. . . ." (*Napa Valley Elec. Co. v. Railroad Comm.* (1920) 251 U.S. 366).

Section 1760 of the Public Utilities Code provides that where a decision of the Commission is challenged on constitutional grounds, the California Supreme Court "shall exercise an independent judgment of the law and the facts." Appellant cannot show that the Court did not act in accordance with this statutory directive in denying its petition.

In seeking review by the highest judicial tribunal in California, appellant certainly provided that Court with appellant's view of all "the law and the facts" upon which review might have been predicated had the Court seen fit to do so. Appellant filed an extensive brief in support of its petition and a comprehensive reply to the answers filed therein. Alleged constitutional encroachments were also presented to the California Court. Appellant cannot be heard to say that its claims of error were not considered by the Court. The rule announced in *Ohio Valley Water Co. v. Ben Avon Borough* (1919), 253 U.S. 287 has been complied

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9. § 1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the Constitutional question shall not be final.

with in the review proceedure below; appellan
failed to demonstrate otherwise.

CONCLUSION

For the foregoing reasons appellee Commis
fully submits that this Court should dismis
appeal from the decision of the Supreme Cour
of California, affirming the decision of this Co

Dated: San Francisco, California
October 19, 1962

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